STATE OF MICHIGAN

COURT OF APPEALS

CHRIS MARK,

Plaintiff-Appellant,

v

CITY OF FLINT, SCOTT SUTTER, DARWIN SPARKS, DAVID FORYSTEK, JOE LASH, and WILLIAM MEYER,

Defendants-Appellees.

UNPUBLISHED
February 18, 2014

No. 313399
Genesee Circuit Court
LC No. 09-091930-CL

Before: O'CONNELL, P.J., and WILDER and METER, JJ.

PER CURIAM.

Plaintiff Chris Mark appeals as of right an order dismissing plaintiff's assault claim against defendant Darwin Sparks. On appeal, plaintiff argues that the trial court erred in entering an earlier order granting summary disposition to defendants on his whistleblower and civil conspiracy claims under MCR 2.116(C)(10), and in denying his motion to reopen discovery. We affirm.

This case arose out of a physical altercation between two City of Flint police officers—plaintiff, a patrol officer, and Sparks, a lieutenant — at the police station. Both plaintiff and Sparks filed complaints with the Flint Police Department. In addition, plaintiff alleges that he phoned the State Police about the altercation and requested that the City of Flint Human Resources Department investigate it.

Eight months after the altercation, plaintiff, while on duty, was dispatched to a call indicating that a woman was screaming for help. Rather than proceed directly to the call, plaintiff stopped to deliver fast food to his girlfriend at a "gentlemen's" club. Plaintiff arrived late to the call, and his employment was terminated. Police Chief Alvern Locke testified that he made the decision to terminate plaintiff for failing to properly respond to the call after reviewing plaintiff's discipline history.

Thereafter, plaintiff filed a complaint, alleging that defendants conspired against him to protect Sparks from discipline for the earlier altercation and to "hyper-scrutinize" plaintiff's conduct in retaliation for filing assault charges against Sparks. Specifically, plaintiff alleged seven counts against defendants: assault and battery (against Sparks only), violation of the Whistleblowers' Protection Act, MCL 15.361 *et seq.*, violation of City of Flint employment

policies, violation of the Michigan constitution's guarantee of equal protection of the laws, violation of the Michigan constitution's guarantee of victim's rights, a deprivation of constitutional rights under color of state law under 42 USC 1983, and conspiracy to violate plaintiff's constitutional rights under 42 USC 1985(3). Plaintiff's claims concerning Flint's employment policies, equal protection, victim's rights, and 42 USC 1983 were dismissed by stipulation of the parties. On December 29, 2010, the trial court granted summary disposition of plaintiff's whistleblower and § 1985(3) claims in favor of defendants under MCR 2.116(C)(10). Plaintiff's assault claim was dismissed on November 2, 2012.

Plaintiff first argues that the trial court erred in granting summary disposition of his claim that defendants violated the Whistleblowers' Protection Act by terminating his employment in retaliation for filing an assault complaint against Sparks. This Court reviews a trial court's decision regarding a motion for summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Summary disposition should be granted under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Id.;* see MCR 2.116(G)(3) and (4). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *Skinner*, 445 Mich at 162.

To establish a prima facie case under the Whistleblowers' Protection Act, a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. *West v General Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). In *West*, the plaintiff engaged in protected activity by filing a report with the police. The plaintiff was subsequently terminated. *Id.* at 184. The Supreme Court held that, even though the plaintiff was terminated after filing the report, there was no evidence the termination occurred *because* of the report. *Id*. at 185. The supervisors who were allegedly aware of the report were not upset by it and did not participate in the termination decision. *Id*. at 185-186. Moreover, the record did not show that the discipline imposed was undeserved. *Id*. at 187. Because the plaintiff failed to show anything "more than merely a coincidence in time between protected activity and adverse employment action," a reasonable juror could not find a causal connection between the police report made by the plaintiff and the subsequent employment decisions affecting the plaintiff. *Id*. at 186, 188.

Defendants moved for summary disposition of the whistleblower claim on the ground that plaintiff could not raise a genuine issue of material fact regarding a causal connection between his reporting of the altercation with Sparks and his termination. In support of their argument, defendants submitted Chief Locke's deposition testimony that he was the only person responsible for the decision to terminate plaintiff and that he did not know that plaintiff had reported an assault against Sparks when he made the termination decision. Chief Locke also testified that he made the decision to terminate plaintiff for failing to properly respond to the emergency call after reviewing plaintiff's discipline history.

In response, plaintiff submitted evidence that: 1) immediately after the altercation, Sparks met with commanding officers — defendants Sergeant Meyer, Sergeant Lash, and Captain Scott Sutter — who were all close friends, 2) Sutter, as an assistant to Chief Locke, had access to discipline and termination documents regarding plaintiff's case, 3) Sutter had a conversation with Chief Locke regarding the penalty for plaintiff's failure to proceed promptly to the emergency call, and 4) Sutter personally informed plaintiff that his employment had been terminated.

We find no error in the trial court's determination that plaintiff failed to demonstrate a genuine issue of material fact. Just as in *West*, the record merely shows a coincidence in time between plaintiff's report of the altercation with Sparks and plaintiff's termination for plaintiff's failure to properly respond to the 911 call, approximately eight months later. Chief Locke testified that he was solely responsible for determining the penalty for plaintiff's failure to properly respond. Plaintiff has not established a factual dispute regarding whether the report of the Sparks altercation played any role in Chief Locke's decision. In fact, Chief Locke was unaware of plaintiff's report and Chief Locke's decision to terminate was made based on a careful review of plaintiff's disciplinary history, which included two "last-chance agreements."

The only evidence that plaintiff has proffered—aside from the temporal sequence of his report and termination—is that a friend of Sparks (Sutter) played a peripheral role in the termination proceeding. Again, Chief Locke made the decision to terminate plaintiff independently. Sutter's access to paperwork and communication with plaintiff regarding the decision had no effect. Sutter testified that the conversation with Chief Locke about the decision was one-sided. Chief Locke talked and Sutter merely listened because he is the "distributor of discipline." Chief Locke concurred that he would not accept advice regarding the decision to terminate from another employee. If Sutter was looking for a way to retaliate against plaintiff for reporting the incident with his friend, there is no evidence Sutter succeeded in doing so by causing plaintiff's termination. Absent a factual dispute with respect to whether a causal connection existed between the protected activity and the discharge, *West*, 469 Mich at 183-184, we find no error in the trial court's decision to grant summary disposition on plaintiff's whistleblower claim in favor of defendants under MCR 2.116(C)(10).

Plaintiff next argues that the trial court erred in granting summary disposition of his civil conspiracy clam under 42 USC 1985(3). To establish a claim under 42 USC 1985(3), a plaintiff must prove:

> (1) the existence of a conspiracy, (2) intent to deny plaintiffs the equal protection of the laws or of equal privileges and immunities under the laws, (3) injury or deprivation of a federally protected right of plaintiffs, (4) an overt act in furtherance of the object of the conspiracy, and (5) some racial or other class-based invidiously discriminatory animus behind the conspirators' actions. [*Mitchell v Cole*, 176 Mich App 200, 210; 439 NW2d 319 (1989).]

Defendants argued that they were entitled to summary disposition of the § 1985(3) conspiracy claim under MCR 2.116(C)(10) because there existed no genuine issue of material fact that plaintiff's conspiracy claim was barred by the intra-corporate conspiracy doctrine and that there was no evidence of an agreement to violate plaintiff's constitutional rights.

The intra-corporate conspiracy doctrine provides that a corporation cannot conspire with its own agents or employees. *Hull v Cuyahoga Valley Joint Vocational Sch Dist Bd of Educ*, 926 F2d 505, 510 (CA 6, 1991). In *Hull*, the court applied the intra-corporate conspiracy doctrine to bar the plaintiff's § 1985(3) conspiracy claim against a school district and certain employees of the school district. *Id.* An exception to the intra-corporate conspiracy doctrine exists where employees act outside the scope of their employment. *Johnson v Hills & Dales Gen Hosp*, 40 F3d 837 (CA 6, 1994). See also, *Blair v Checker Cab Co*, 219 Mich App 667, 674; 558 NW2d 439 (1998).

Plaintiff argues that the exception applies to this case because defendants were motivated by a personal interest in protecting Sparks from questioning, prosecution, or discipline. Plaintiff has not, however, provided evidence of any acts by defendants that were outside the scope of their employment. While plaintiff contends that (1) immediately after the assault, Sparks met privately with Lash, Meyer, and Sutter, (2) that Deputy Chief Forystek ordered that the investigation be transferred to the Michigan State Police, (3) that Sutter ordered that a separate, internal, investigation be conducted by the City of Flint Police Department without the knowledge of the chief or deputy chief, and (4) that Sparks was not interviewed in the internal investigation, he has not shown that any of these acts were outside the scope of defendants' employment. Furthermore, plaintiff has not submitted any evidence of an agreement between defendants, tacit or otherwise, to delay or influence the investigation. While plaintiff speculates that defendants conspired against him, he has not submitted evidence to demonstrate the existence of a factual dispute regarding whether defendants agreed to attempt to delay the investigation. Therefore, plaintiff has not shown that the trial court erred in granting summary disposition of the conspiracy claim under MCR 2.116(C)(10).

Finally, plaintiff argues that the trial court erred in denying his motion to reopen discovery that accompanied his motion for relief from judgment with respect to the whistleblower and civil conspiracy claims. This Court reviews a trial court's decision to deny a motion to permit discovery after the passage of a discovery deadline for an abuse of discretion. See *Kemerko Clawson LLC v RxIV, Inc*, 269 Mich App 347, 349-351; 711 NW2d 801 (2005); MCR 2.401(B)(2). The trial court denied plaintiff's motion for relief from judgment with respect to the whistleblower and civil conspiracy claims, and plaintiff has not challenged that decision on appeal. Further discovery would have been relevant only to the whistleblower and civil conspiracy claims, not the assault claim that remained pending. Therefore, the trial court did not abuse its discretion by denying the motion to reopen discovery.

Affirmed. Defendants may tax costs. MCR 7.219.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter